APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 15-4534

MICHAEL H. NORRIS,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

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II. DID THE BDOA ERR IN APPROVING THE 1977 RATING DECISION FINDING THAT APPLELLANT'S MENTAL CONDITION WAS NOT A DISABILITY UNDER THE LAW?

III. DID THE BDOA ERR IN FINDING THAT THE 1977 MET EXISTING STATUTORY REQUIREMENTS FOR APPLICATION OF THE STATUTE ESTABLISHING THE PRESUMPTION OF SOUNDNESS. 38 U.S.C.§1111? DID IT PROVIDE ADEQUATE REASONS AND BASES FOR DENYING THE CUE CLAIM ON THE MERITS?

STATEMENT OF THE CASE AND FACTS

Background

1. Michael Norris enlisted in the Army in February 1973. No mental problems were noted on his entry physical (RBA at 1627-28).

2. Service medical records show he repeatedly suffered from anxiety and diarrhea secondary to nervousness while in service. Specifically:

- On February 27, 1973 Appellant asked to see MHCS [presumably "mental hygiene clinic"] for "problems" (RBA at 1151). There is no record, however, of a visit to the mental health clinic before October 1973.
- April 2, 1973 he complained of "diarrhea for two days" and "bad nerves". He was prescribed Valium, an anxiety drug (RBA at 1155).
- May 1, 1973 he complained of nervousness and asked to see a psychiatrist. That day he was seen by a Physicians' Assistant, (PA) who reported that the

veteran had “two prior episodes of ‘nervous breakdowns’ in civilian life” (RBA at 1157 (1157-58)). The PA gave no source for these statements. He further reported that the veteran “failed PT in BCT and was placed in SCT, ever since has had ‘vague complaint of diarrhea associated [with] anxiety or stressful situation.’ States meds do not control diarrhea. Has seen MHC service once (no notes).” It continued, “Now states he feels he can’t make it and wants out” (RBA at 1157). The PA’s impression was “Character & Behavior disorder.” The prescribed plan was for a “MHC consult for evaluation of above” (RBA at 1158).

- On July 9, 1973, Appellant again sought medical care. He complained of loss of memory, fatigue and anorexia. He was seen by a doctor whose impression was “line of duty – Yes” (*Id.*). Appellant was referred to “M.O. [unintelligible]”.
- September 13, 1973, Appellant reported taking “valium for nerves” on a dental questionnaire (RBA at 1161).
- On October 23, 1972, Appellant was seen by an Army doctor for diarrhea due to nervousness, blackouts (RBA at 1159). The medical doctor, Captain Holloway, gave his impression as “Highly nervous, [unintelligible] pupils. He recommended, “psychiatric evaluation” (*Id.*). Dr. Holloway specifically requested Psychiatric Consultation saying, “Pt has had chronic anxiety problems & needs use of tranquilizers - frequently - Seems to have problem adjusting – Rec Psychiatric Evaluation” (emphasis in the original).

RBA at 1162.

- Rather than getting the psychiatric attention Dr. Holloway recommended, the resulting consultation was by a low ranking [E-2] Army Social Work/ Psychology Specialist, Pvt. Poulos, who said Appellant had previously been seen at Mental Hygiene Consultation Service on "numerous occasions since October 4, 1973." The E-2's "Impression" was that Appellant had "related problems of confusion and anxiety centered around the duties and various tasks that are given him at his unit . . . anxiety is manifested by, confusion as to the duties he is to perform, and trouble adjusting to his job situation." The E-2's "Disposition" was to counsel the vet so he "more clearly (understood) his obligations in the military." The Recommendation was "Follow-up will be coordinated between MHCS and the subject's company commander" (*Id.*). This was countersigned by a civilian Social Worker (*Id.*).
- A March 14, 1974 treatment note by Dr. Holloway reported "malaise – no acute distress" (RBA at 1151).
- On June 4, 1974, he was again seen by Dr. Holloway at the medical clinic. The first line on the entry is hard to read, the second line says: "c/o [complains of] personal problems." The third line says: Hx [history] –"See MHS report." The fourth line say "Reconsider" (RBA at 1641).

3. Other service medical records (SMR's) include several diagnoses of hearing loss, and medical problems including a head injury, a foot strain, breathing difficulties, vision problems, and having a cold.

4. Regarding Appellant's weight, notations of this occur on enlistment "70 inches" [5'10"], 140 pounds (RBA at 1149 (1148-49)), and on discharge 5'8", 135 pounds (RBA at 1174 (1173-74)). Per these records, he lost five pounds and two inches in the Army. A December 1974 medical history at discharge contained note of "yes" to "Recent Gain or loss of weight" (RBA at 1650). The SMRs contain another mention of weight change in a July 1973 diagnosis of anorexia (RBA at 1158)].

5. A discharge physical in December 1974 (RBA at 1171-75), showed hearing loss in service. His PULHES rating for hearing went from 2 to 3 (RBA at 1174). On his Report of Medical History at discharge Appellant noted frequent trouble sleeping and depression or excessive worry (RBA at 1171). The discharge clinical evaluation ignored both these assertions, and the SMR's showing mental health issues [cited above]. It only noted refractive error and partial deafness, left ear (RBA at 1172 and 1174).

6. Veteran was discharged December 31, 1974, under honorable conditions. Total service was 1 year, 10 months and 18 days (RBA at 37, 1177). Grounds for discharge were "Failure to meet acceptable standards for continued military service" under a catch-all Army Regulation, AR 635-200, paragraph 5-37 (Apx. pp ii-xii).

7. On October 31, 1974, Appellant notified the Army that he had filed application for VA compensation by checking a block on an Army form (RBA at 1176). A VA claim was established for the vet's hearing loss, effective 12-31-74 (stamped in by

the Phoenix VA Regional Office [VARO] Jan 6, 1975) (RBA at 1178-79). In three weeks the VARO denied the claim on grounds hearing loss preexisted service and did not increase in severity during service (RBA at 1145).

9. Appellant submitted a March 1, 1977, handwritten statement "amending" his claim for "service connection for a nervous condition." He said, "I was treated at Fort Lewis, Washington Mental Hygiene (*sic*) Clinic. Please request my military records in support of my claim. I was treated during 1974" (RBA at 1126). He also filed VA Form 21-527 [Income-net Worth and Employment Statement; a VA Form 21-527 is currently an application for pension] showing NO Employment since his Army discharge, and attributing his inability to work to poor hearing and a nervous condition (RBA at 1124-25, 1142). This was followed by a statement from his mother, Emmalou Norris, March 4, 1977, saying the conditions affected his ability to obtain work (RBA at 1140).

10. A June 9, 1977 VA psychiatric rating exam (RBA at 1130) was conducted without Veteran's VA Claims file or military medical records. It said Appellant "apparently remained in the Service for approximately 10 months" (actually 1 year and 10 months, RBA at 37). The examiner described Appellant's mental health treatment in the Army as "a little obscure." It contained no discussion of Appellant's service mental records and only recorded what the examiner understood the Appellant said about his treatment. It paraphrased statements about Appellant's pre-service mental health, saying he had "progressive feelings of nervousness, apprehension" dating back to 1968, the time of his father's death.

Diagnosis was “Anxiety neurosis” (RBA at 1130).

11. A July 1977 Rating Decision denied Appellant’s mental health claim. The VA notification letter said: “In order to establish entitlement to this benefit, the evidence must show that the disability was incurred in or aggravated by military service. The service medical records show that prior to entering service you had two episodes of a nervous condition treated by your family doctor. At the time of discharge there were no complaints nor any indication shown of a nervous condition.” The Rating Decision said “Service diagnosis was character/behavior disorder, not a disability under the law. At the time of discharge the veteran had no complaints nor was there shown any indication of any mental disorder.” It claimed Appellant’s mental condition pre-existed service. “There is no evidence to show that veteran's currently diagnosed anxiety neurosis related to the condition diagnosed in service as a character behavior disorder, and service connection is denied for anxiety” (RBA at 1116-17).

12. On Jan 6, 1999, Appellant filed a claim for VA compensation or pension, alleging chronic depression (RBA at 2981-84). After considerable VA adjudication and a November 27, 2007, Notice of Disagreement (NOD) regarding the effective date of grant of service connection (alleging CUE in the denials in 1977 and 1999 decisions; RBA at 2556-61), a May 2, 2014, BVA decision concurred that the criteria for an effective date of January 25, 1999, but no earlier, had been established for service connection for Appellant’s acquired psychiatric disorder. He was granted VA benefits back to that date for his mental condition

(RBA at 1784-1817).

13. Appellant appealed the May 2, 2014, BVA decision which denied CUE in the original 1977 rating decision to the Veterans Court (Vet. App. No. 14-1780). As the result of that appeal, the Court approved a Joint Motion for Remand (JMR) in its order of December 4, 2014 (RBA at 1767). The JMR noted that the Board's citation to 38 C.F.R. § 3.306(a) appeared to confirm the Board had misapplied the statutory presumption of soundness. Remand was to permit the BVA to give reasons and bases for how it applied the presumption of soundness (RBA at 1764 (1762-66)).

14. On March 16, 2015, the Board Decision on Appeal (BDOA) continued denial of an effective date prior to January 25, 1999 for establishment of service connection for his acquired psychiatric disorder. The BDOA included discussion of CUE in the July 1977 rating decision (RBA at 2-26).

17. Appellant timely appealed the BDOA.

Prologue

In May 2014, the BVA found that the Appellant is service connected for his mental condition, retroactive to a date in July 1999 when he refiled a claim for that condition. That 1999 claim, however, was not the first time he had made a claim for his mental condition. He had filed an earlier claim in 1977 which was denied by a VA Regional Office.

Through his guardian/fiduciary, Appellant challenges the July 1999 effective date, asserting that when he filed his claim for nervous condition in 1977, and

when the VA Regional Office denied that claim, the VA failed to apply VA law that was then in effect – an act of clear and unmistakable error (CUE). This error entitles him to an effective date in 1977.

Absent any objective indicia that the 1977 rating decision correctly applied the presumption of soundness – or considered it at all – the Board of Veterans Appeals decision on appeal (BDOA) has relied on two theories in its attempt to defeat Appellant's assertion that the 1977 VA adjudicator committed such CUE. The theories the BDOA relies on are:

1. Since there was no regulatory requirement in 1977 that the VA adjudicator provide reasons and bases for its decision[1] the VA decision denying Appellant's 1977 claim did not need to contain any discussion of whether, or how, it applied existing law regarding the presumption of soundness, principles of chronic disease and continuity, or chronic disease subject to presumptive service connection.
2. Since there was a regulation in 1977[2] which permitted the statutory presumption of soundness evidence requirements to be satisfied by findings of general medical principles (without corroborating records) it may be

[1] As there has been since February 1990 following the enactment of the Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, 103 Stat. 2062 (1988), which added a statutory provision mandating that decisions denying benefits include a statement of the reasons for that decision.

[2] Holding that there were "medical principles so universally recognized as to constitute fact (clear and unmistakable proof)" which when applied, eliminated the need for any "additional confirmatory evidence." 38 C.F.R. § 3.303(c) (1977).

presumed that the VARO found, applied, and relied on such principles.

By combining these two theories, the BDOA concludes that 1977 rating decisions, such the one which denied Appellant's claim, could be *presumed* to have correctly applied existing law regarding the presumption of soundness - without containing any consideration or discussion of the evidentiary findings required by the applicable statutes.

Appellant contends that the BDOA's theories misstate the law and permit clear and unmistakably erroneous VA decision making. This brief will point to numerous examples of Veterans Court jurisprudence which counter these theories. Established law addressing CUE would be undermined and negated should the Court accept these BDOA theories.

SUMMARY OF ARGUMENTS

I. THE BDOA ERRONEOUSLY CONCLUDED THAT THE 1977 RATING BOARD HAD NO REQUIREMENT TO ADDRESS ITS REJECTION OR REFUSAL TO APPLY THE PRESUMPTION OF SOUNDNESS AND PRESUMPTION OF AGGRAVATION

The BDOA erred in interpreting the absence of a regulatory requirement for reasons and bases in 1977, to be a carte blanche for Rating Boards to ignore requirements for specificity needed to rebut statutory presumptions of soundness and aggravation. Statutes and implementing authority at the time relating to application of the Presumption of Soundness contained independent requirements for specificity which the BDOA failed to recognize. Appellant was severely prejudiced by the BDOA's failure to follow law of the case and applicable

regulation, and is likely to suffer continued prejudice if the Board is not required to follow these standards.

II. THE BDOA ERRED WHEN, WITHOUT EVIDENCE WHICH WAS IDENTIFIED OR IN THE RECORD AT THE TIME OF THE 1977 RATING, FOUND THERE TO HAVE BEEN CLEAR AND UNMISTAKABLE EVIDENCE 40 YEARS LATER THROUGH POST HOC RATIONALIZATION

Without citation to any fact finding in the record, or citation to a "medical principal universally recognized at to constitute fact," the BDOA found sufficient evidence of record at the time of the 1977 rating decision to rebut the presumption of soundness from which the RO could have concluded that the Veteran had a pre-existing psychiatric disorder. This finding if permitted to stand would eliminate future BVA CUE reviews by permitting blanket presumptions that the presumption of soundness was rebutted.

ARGUMENTS

I. THE BDOA ERRONEOUSLY CONCLUDED THAT THE 1977 RATING BOARD HAD NO REQUIREMENT TO ADDRESS ITS REJECTION OR REFUSAL TO APPLY THE PRESUMPTION OF SOUNDNESS AND PRESUMPTION OF AGGRAVATION.

One of the BDOA's first theories is that, in 1977, the Rating Board was under no obligation to address its failure or refusal to apply existing law, i.e., the Presumption of Soundness and Presumption of Aggravation (38 U.S.C. §1111 and 38 U.S.C. §1153). The theory is based on the absence at the time of a regulatory requirement for rating boards to provide reasons and bases for their decisions, rating decisions are presumed to be valid.

> *The Board finds the Veteran's allegations of CUE in the 1977 rating decision based on the RO's failure to consider or apply the presumption of soundness, principles of chronic disease and continuity, and chronic disease subject to presumptive service connection to be unpersuasive. Prior to February 1990; the RO was not required to provide a statement of reasons or bases for their decision, and the Federal Circuit has held that RO decisions prior to that date are presumptively valid, even in the absence of such discussion*. [citing *Natali v. Principi*, 375 F.3d 1375, 1380 (Fed. Cir. 2004)]. RBA at 17 (2-26).

The holding in *Natalie* is not as broad as the Board claims it to be. The Court in *Natalie* said, "In *Pierce v. Principi*, 240 F.3d 1348, 1355-56 (Fed. Cir. 2001), for example, we recognized that in 1945 the rating board was not required to set forth in detail the factual bases for its decisions, and that in the absence of evidence to the contrary, the rating board is presumed to have made the requisite findings." *Natalie,* 375 F.3d at 1380 (emphasis added). The Federal Circuit did not say that decisions are presumed to be valid. It only said the rating boards are presumed to have made the requisite finding. Other errors may still be lead to a conclusion that the decision contained CUE.

a. Error #1 in the BDOA's presumption of adequate validity.

The BDOA's theory that no reasons or bases were required at the time serves only to protect 1977 rating board decisions against allegations that they did not contain adequate reasons and basis in finding Appellant's condition to preexist service. This theory is frequently employed to defend rating decisions from attacks based on a simple lack of reasons and bases, but contrary to the BDOA's understanding, Appellant's complaint about the 1977 decision was not solely

based on a lack of reasons and bases. There were other requirements for the Rating Decision to provide an explanation for its decision at the time that the BDOA ignored – to Appellant's prejudice.

Addressing the second prong of a CUE analysis including the requirement for application of the statutory presumption of soundness (38 USC § 1111), the BDOA acknowledged that "Veteran admittedly was not required to show evidence that his psychiatric condition worsened or was aggravated during or by service…." RBA at 24 (2-26). Moving quickly from that concession, however, the BDOA found "it was nevertheless reasonable for the RO to conclude at the time, based on the evidence of record, that a pre-existing disorder was clearly and unmistakably not aggravated by service" (*Id.)*.

This was an overly simplistic analysis, based on the *Natali* case, which failed to reckon with existing requirements noted by Judge Steinberg in *Joyce v. Nicholson*, 19 Vet. App. 36 (2005). That case enunciated a requirement, which did exist in 1977, that rating decisions purporting to address the Presumption of Soundness, must contain "specific findings." This requirement for *specific findings* existed in 1977 and was separate and distinct from the requirement, later enacted, for reasons and bases. The BDOA erred in failing to recognize the 1977 Rating Board's obligation to provide specific findings for its determinations that the Presumption of Soundness had been rebutted and the Presumption of Aggravation did not apply.

The *Joyce* case was decided with full deference to, and discussion of,

Natali. In *Joyce*, as here, the Court's review of the aggravation issue was triggered by a determination that a preexisting disability had undergone a worsening in service. *Joyce* held that, in applying law that has existed since 1955 (much earlier than the facts of this case), the VA had a requirement to make "specific findings" enunciating the facts on which it relied to rebut the statutory presumptions of soundness and aggravation. The 1977 Rating Decision contained no discussion or specific findings, nor did it say it was rebutting any statutory presumption. It did contain any language suggesting that the evidence upon which it relied was "clear and unmistakable" or what made its evidence adequate to rebut the presumptions. Absent such findings, it was error to for the BDOA to conclude that the presumption of aggravation had been adequately rebutted in 1977.

The law as analyzed in *Joyce* was the predecessor to the current standards for aggravation of preservice conditions found in 38 C.F.R. § 3.306 (Veterans Regulation (VR) No. 1(a), part I, paragraphs 1(b), (d) (1943)). The Court in *Joyce* explained that that regulation was essentially unchanged by its successor, VA Regulation 1063(I) (1946) (implementing regulation for forerunner of 38 U.S.C. §§ 1111 and 1153), regarding the presumption of soundness upon entry into service and the presumption of aggravation, because the record before the RO in 1955 "contained no evidence that the increase in severity of [his] ulcer condition was the natural progress of [his] pre-service ulcer condition."

In 1977, the successor to the same line of regulations was 38 C.F.R. §3.306.

In 1977 the language of §3.306 (App. pp xv-xvii) was essentially unchanged from what it had been since before World War II, *i.e*., VA No. 1(a). The language of the regulation has long required that a preexisting injury or disease would be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a **specific finding** that the increase in disability is due to the natural progress of the disease.

This specific finding requirement set the stage for the Norris 1977 rating decision. It established the presumption of service connection IN THE ABSENSE OF SPECIFIC FINDINGS. And indeed there were no specific findings in the 1977 denial – leaving the outcome to require service connection – which was not granted. This failure to follow regulations existing at the time was CUE. There is no question that the outcome would be manifestly different had the regulation been followed. Indeed, it would have been required by regulation without any further factual discussion.

b. Error #2 in the BDOA's presumption of adequate validity

The BDOA ascribes "validity" to the 1977 rating decision because there was no reasons or bases regulation in existence at the time. What the BDOA cannot avoid, however, is the plain requirement that – if the rating board does attempt to offer a rationale for its action – it should be correct. The 1977 rating board did offer an explanation for what it decided even though, as the BDOA points out, there was no requirement to make such an offer of rationale.

The rating board's decision contained the following language: "Service

diagnosis was character/behavior disorder, not a disability under the law" (RBA at 1116 (1116-17)). The BDOA itself concedes that the July 1977 rating decision contains clear error on that point. "The Board finds that the only clear error contained in the July 1977 rating decision is the RO's statement that 'at the time of discharge the Veteran had no complaints nor was there shown any indication of any mental disorder.' In that regard, it is clear that the RO denied the existence of evidence in the claims file that indeed existed" (RBA at 24 (2-26)).

Despite having found this error, the BDOA went no further. It did not question the 1977 rating decision language declaring Mr. Norris' mental disorder to be a character/behavior disorder, not a disability under the law." It was by this incorrect assertion of law that the 1977 rating board denied service connection. Assuming the BDOA is correct in finding error in the 1977 rating characterization of Appellant's mental condition, it was absolute error for the VA in 1977 to deny benefits on the tired and overused theory that the mental condition was not a "disability under the law." The law at the time did not support such a conclusion, nor has it ever support the conclusion that a diagnosable mental condition is not a disability under the law.

Having elected to engage in an explanation for its denial, the 1977 rating decision had an obligation to be right in that explanation. It was not right. It was absolutely wrong, beyond rational disagreement, for the 1977 raters to deny Mr. Norris VA compensation on the grounds that his diagnosed mental condition was not a disability under the law. The rating decision listed the condition as an

anxiety neurosis – VA disability code 9400. That code, for anxiety neurosis, appears in the 1977 version of 38 CFR §4.132, Schedule of Ratings – Mental Disorders [page 343]. See, DC 9400 from 1977 CFR (Apx. pp xiii-xiv). If the Rating decision had not said that it was denying Mr. Norris' claim for that reason, it possibly might have been more defensible. But when it said that it was denying the claim for a reason not supportable in law, it was clear error.

II. THE BDOA ERRED WHEN, WITHOUT EVIDENCE WHICH WAS IDENTIFIED OR IN THE RECORD AT THE TIME OF THE 1977 RATING, FOUND THERE TO HAVE BEEN CLEAR AND UNMISTAKABLE EVIDENCE 40 YEARS LATER THROUGH POST HOC RATIONALIZATION

The BDOA acknowledged that, satisfied at that time of the July 1977 rating decision it was *Not in Dispute* that the requirements for application of the presumption of soundness were satisfied (RBA at 16 (2-26)). The BDOA further confirmed that, "in order to determine whether the July 1977 rating decision involved CUE, the Board must determine whether there was clear and unmistakable error based on the record and the law that existed at the time of that decision."

The BDOA then noted that at the time of the 1977 VA rating decision, there was a regulation which "provided that there are medical principles so universally recognized as to constitute fact which would be acceptable at clear and unmistakable proof of a pre-existing condition (RBA at 15, 19 (2-26)).

Then, without citation to any finding of fact in the record, or citation in the record referencing any "medical principal universally recognized at to constitute

fact", the BDOA stated that it was able to find:

> *sufficient evidence of record at the time of the 1977 rating decision from which the RO could conclude that the Veteran clearly and unmistakably had a pre-existing psychiatric disorder and that a medical opinion or medical evidence of the Veteran's pre-service mental health status were not required to find that a psychiatric disorder clearly and unmistakably pre-existed his period of service*. (RBA at 20 (2-26)).

This BDOA finding was based principally upon the *existence* of a regulation which permitted VA decision making based on universally recognized medical principles – which, the BDOA determined, need not appear in the rating decision because the RO did not have to consider or discuss their rationale because, at the time, there was no "reasons and bases" regulation.

This *post hoc* rationalization permits the BDOA to ratify all rating decisions which should have, but did not, address the statutory presumption of soundness. No facts, and no enunciated of medical principle would be needed. This is a rationalization which, if accepted by the Court, would forever eliminate claims of CUE in rating decisions made before the VA was required to offer reasons and bases for its actions.

Appellant contends that this reasoning constitutes nothing more than prohibited post hoc rationalization. *Auer v. Robbins,* 519 U.S. 452, 461-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (noting Secretary's position may not be a "'*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack." (internal citations omitted))**.** The BDOA citation to the existence of a regulation at the time, which permitted decision making based not on fact, but

on “universally recognized medical principles” is inadequate to make a finding rebutting a statutory presumption – absent some reference in the underlying decision to such a principle. The record contains none. The BDOA theory is nothing more than an open gate through which all rating decisions prior to a certain date should be ratified without the rigorous review required in *Joyce v. Nicholson*, 19 Vet. App. 36, 42 (2005).

CONCLUSION

The BDOA has constructed a theory for approaching CUE claims which permits it to find that any prior VA decision can be approved without addressing the requirements embodied in the statutory presumptions of soundness and aggravation. When a prior VA decision is found to have denied a claim for benefits on the grounds that the condition was pre-existing, or that the condition was not aggravated in service, the BDOA cobbles together a theory based on non-existence of requirements to explain the decision – together with the existence of a regulation that permitted substitution of medical principles for finding of fact.

For this theory to operate successfully however, the BDOA must turn a blind eye to this Court’s jurisprudence and VA General Counsel guidance which independently requires specific findings of fact to rebut the statutory presumptions. That is exactly what the BDOA did in this case. Although the Board had received the case on remand from the Veterans Court once before – with instructions to do

a better job of addressing the 38 U.S.C. §1111 Presumption of Soundness, it instead propounded this new theory which again excused a total absence of rebutting facts, *i.e.*, clear and unmistakable evidence of a pre-existing condition, and clear and unmistakable evidence to rebut the presumption of aggravation. In the Board's eyes no such evidence was necessary to support the 1977 decision because the existence of evidence can be presumed – not specifically found.

It is now clear, based on the past two Board decisions in this case, that the Board has no intention or willingness to find CUE – regardless of the facts that existed or did not exist at the time of the original rating decision. It is now incumbent upon the Court to do what the Board is unwilling to do, and apply the requirements of the law to the case. The Board decision on appeal should be reversed and the Court should issue its order directing a finding of clear and unmistakable error in the VA's 1977 rating decision – based on the failure to identify clear and unmistakable evidence adequate to rebut the Presumptions of Soundness and Aggravation.

RESPECTFULLY SUBMITTED this 20th day of June, 2016.

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Appendix

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AR 635-200

JOINT MESSAGEFORM

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BOOK | MESSAGE HANDLING INSTRUCTIONS

FROM: DA (DAPE) Wash DC//DAPE-MPE//

Rec'd 10/10/74

TO: All holders of initial distribution copies of AR 635-200

SUBJECT: Interim Change to Chapter 5, AR 635-200.

REFERENCES:

a. DA Message DAPE-MPP, 242110Z Sep 71, subj: Extension of Qualitative Management Program to Grades E-1 and E-2.

b. DA Message DAAG-PSS, 191425Z Oct 71, same subject as Reference a.

c. DA Message DAPE-MPP, 121443Z May 72, same subject as Reference a.

d. DA Message DAPE-MPP, 251505Z Aug 72, same subject as Reference a.

e. DA Message DAPE-MPP, 161705Z Feb 73, same subject as Reference a.

1. This message is being distributed through the publications pinpoint distribution system to all holders of AR 635-200. The widest possible dissemination of its contents is directed.

2. Significant change reflected herein is the approval authority for separation.

3. This change supersedes references a through e, above.

4. Para 5-37 is added to AR 635-200 as follows:

"5-37. Discharge for failure to demonstrate promotion potential.

a. General. Personnel whose performance of duty, acceptability for the service and potential for continued effective service fall below the standards required for enlisted personnel in the United States Army may be discharged in accordance with the following criteria. Discharge under this paragraph is limited to:

(1) Personnel who fail to be advanced to the grade of E-2 after four months active duty.

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(2) Persons who fail to demonstrate potential to justify advancement to the grade of E-3 after attaining the normal time-in-service and time-in-grade criterion for promotion to grade E-3, without waiver, established in Chapter 7, AR 600-200.

b. Purpose. The philosophy of this policy is that commanders will be able to anticipate and preclude the development of conditions which clearly indicate that soldiers concerned are becoming problems to an extent likely to lead to board or punitive action which could result in their separation under conditions which would stigmatize them in the future. The purpose of this policy is to provide commanders appropriate means for separating such personnel before board or punitive action becomes necessary. It is contrary to the intent of this policy--

(1) To make arbitrary or capricious use of this authority.

(2) To unjustly force the separation of individuals who possess a potential to be rehabilitated.

c. Scope. This policy applies to RA enlistees, inductees, reserve component personnel ordered to active duty (including those ordered to active duty due to unsatisfactory participation in their reserve assignment) and personnel on active duty for training under REP 63.

d. Unit Commander responsibility.

(1) A commander who elects not to promote to E-2 or E-3 must counsel the individual verbally as to the reasons for his action, to include those circumstances which clearly indicate that the soldier's attitude and/or performance do not measure up to Army standards. If the commander suspects that the individual is deliberately attempting to use this policy as a means of avoiding service, the commanders must advise the soldier that he is demonstrating traits that could lead to board action for separation as unfit or unsuitable (Chapter 13).

(2) Counseling will be recorded in a written statement signed by the commander and the member. The written statement will also include, over the member's signature, a statement that he understands his status, what is expected of him, and what he can anticipate for nonperformance.

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(3) Commanders who elect not to promote to E-2 or E-3 may elect to initiate separation action under this paragraph within 30 days of such denial of promotion.

TO:

(4) If separation action is not initiated within 30 days after initial denial of promotion to E-2 or E-3, the commander may reconsider members in grade E-1 or E-2 for promotion in 30-day increments up to a total of four months after initial denial of promotion. At the end of each 30-day period the commander may promote, retain and counsel, or recommend discharge. Maximum use of this period to assist the soldier to overcome deficiencies is encouraged. At the end of the four-month period, the commander must promote to E-2 or E-3, or must initiate discharge action.

(5) When the commander elects to initiate separation action under this paragraph, he will forward a recommendation for discharge through channels to the commander having approval authority (f below). The recommendation will be for discharge for failure to demonstrate adequate potential for promotion and will include the following information:

(a) The commander's signed statement indicating the action taken and the counseling and advice previously given the soldier concerning the impact of failure to demonstrate the standards of conduct and ability required by the U. S. Army. The following statement, signed by the soldier concerned, will be added below the commander's signature: "I acknowledge having been counseled as stated above. I understand the impact of this action."

(b) The initiating commander's recommendation of the character of discharge to be awarded (honorable or general). Normally, an honorable discharge will be awarded unless the soldier's conduct clearly substantiates a general discharge (paragraph 1-9).

e. Intermediate commanders. Commanders in the chain of command will forward recommendations for discharge with a recommendation for approval, disapproval, or for reassignment for rehabilitation if, in their opinion, the circumstances in the case warrant such action. Each intermediate commander will insure that the member has been fully counseled, that the recommendation for discharge is fully documented, and that such action is not in conflict with any of the provisions of this paragraph

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f. Approval authority. Commanders exercising special court-martial jurisdiction are authorized to take final action in all cases involving separation with an honorable discharge. Cases in which a general discharge is recommended will be forwarded to commanders exercising general court-martial jurisdiction for final action. Approval authorities may issue honorable discharge certificates to individuals receiving unsatisfactory efficiency ratings as their final ratings when other circumstances clearly warrant an honorable discharge. The commanders having approval authority may:

(1) Approve or disapprove the recommendation. If he approves discharge and the soldier is stationed in CONUS or his area of residence, he will direct that discharge be accomplished immediately. Oversea commanders will, if discharge is approved, direct the return of the soldier to CONUS or his area of residence as soon as possible, with instructions for discharge upon arrival thereat.

(2) Approve the recommendation and suspend the discharge for any period of time not to exceed four months. Promotion during the period of suspension vacates the approved recommendation for dischatge. If the soldier is not promoted by the end of the period of suspension, he will be discharged.

(3) Direct transfer of the individual concerned to another organization is his command for rehabilitation purposes.

g. Exceptions. This policy does not apply to:

(1) Soldiers whose conduct clearly warrants courts-martial action or administrative discharge by board action for reasons for which an undesirable discharge is authorized (Chapter 13 and 14, this regulation, and AR 635-206).

(2) Individuals who are not promoted to grade E-2 or E-3 due to hospitalization, emergency leave, or similar conditions beyond their control.

(3) Soldiers who have been reduced to grade E-1 or E-2 regardless of time in service.

(4) Individuals who have not attained the normal time-in-service/time-in-grade criterion for promotion without waiver.

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h. Separation orders. Authority for separation (para 5-37, AR 635-200) and SPN 21U will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel office designated to accomplish separation processing. Separation will be by discharge for active Army and USAR personnel. Army National Guard personnel will be discharged from their "Reserve of the Army" status, only, and returned to their State National Guard for appropriate disposition.

i. Transition training. Personnel to be discharged under this paragraph will be afforded the opportunity to receive preseparation vocational counseling and job placement services under the Army Transition Program in accordance with paragraph 30a and b, AR 621-5.

j. Reentry precluded. Individuals discharged under this paragraph will be ineligible to enlist or reenlist without a waiver. Accordingly, the DD Form 214 will be coded 'RE-3'."

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FROM: CDRMILPERCEN ALEX VA//DAPC-PAS-S//

TO: ALL HOLDERS OF AR 635-200

SUBJECT: Interim Change to AR 635-200

1. This change is being distributed through publications pinpoint distribution system to all holders of AR 635-200 and is effective upon receipt. The following messages are superseded by this pinpoint change:

a. DA msg DAPE-MPE-PS 082221Z Nov 74, subject: Expeditious Discharge Program (EDP)

b. DA msg DAPE-MPE-PS 111445Z Nov 74, subject: Change to Chapter 5, AR 635-200

c. DA msg DAPE-MPE-PS 112355Z Dec 74, subject: Change to Chapter 5, AR 635-200. Distributed only to Europe

d. DA msg DAPE-MPE-PS 211333Z May 75, subject: Expeditious Discharge Program

This message implements the Expeditious Discharge Program Army wide. Discharge authority is changed to authorize officers in grade of LTC (05) who are commanders of battalions and battalion-size units to direct discharges under this program. Further, a provision is added to provide for discharge in absentia when an individual absents himself without leave subsequent to the date the individual consents to discharge and the date the initiating commander formally recommends approval of the discharge. Loss ceilings and quotas are removed.

2. Para 5-37, Section XV, is superseded as follows:

5-37. Expeditious Discharge Program. a. General. This program provides that individuals who have demonstrated that they cannot or will not meet acceptable standards required of enlisted personnel in the Army, because of the existence of one or more of the following conditions, may be discharged:

(1) Poor attitude.

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PAULA KERR, MIL PERS MANGT SPEC, DAPC-PAS-S, 325-8736, 3 June 1975	The Pentagon Library Rm-1A518, Pentagon Washington, D.C. 20310
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(2) Lack of motivation.
(3) Lack of self-discipline.
(4) Inability to adapt socially or emotionally.
(5) Failure to demonstrate promotion potential.

b. Scope. This policy applies to all active Army personnel, including Army National Guard (ARNG) and Army Reserve (USAR) personnel ordered to active duty who have completed at least six months but not more than 36 months of continuous active duty at the time the member's immediate commander formally recommends discharge under this paragraph. For purposes of this policy, a break in service of not more than 90 days does not interrupt continuity of active duty. This program does not apply to ARNG and USAR members on any type of active duty for training (ADT).

c. Purpose. This policy will provide for the expeditious elimination of substandard, nonproductive soldiers before board or punitive action becomes necessary. These provisions are intended to relieve unit commanders of the administrative burden normally associated with processing eliminations for cause through administrative discharge boards by providing a means to discharge such personnel expeditiously before they progress to the point where board or punitive action becomes necessary. The program is not intended to be a panacea for normal personnel problems or a relief from the professional obligation of commanders to exercise effective leadership and exert a sincere effort to produce good soldiers from seemingly poor ones.

d. Limitations. It is contrary to the intent of this policy for commanders to do the following:

(1) To use this policy as a substitute for appropriate administrative action under para 5-38; chapters 13, 14, or 15 of this regulation; Section VI, AR 635-206; processing through medical channels because of physical or mental defects; or appropriate disciplinary action.

(2) To make arbitrary or capricious use of this authority.

(3) To force the separation of individuals who:

(a) Possess a potential for rehabilitation.

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(b) Decline discharge under this policy.

e. Identification and Screening.

(1) Individual characteristics that will assist in identifying individuals who should not be retained in the Army include, but are not limited to the following:

(a) Quitter.
(b) Hostility toward the Army.
(c) Inability to accept instructions or directions.
(d) Clearly substandard performance.
(e) Evidence of social/emotional maladjustment.
(f) Lack of cooperation with peers or superiors.

(2) Personnel identified as vulnerable for discharge under this program will generally fall into one of three categories:

(a) The individual who obviously cannot adjust to the Army environment.
(b) The individual who responds initially but within a short period of time demonstrates that he/she is incapable of permanent adjustment.
(c) The individual who completed BCT and AIT but later demonstrates that his/her potential for further service is doubtful.

f. Standards and Criteria

(1) No members shall be discharged under this program unless the Army member voluntarily consents to the proposed discharge. The Army member's acceptance of discharge may not be withdrawn after the date the discharge authority approves the discharge.

(2) Individuals discharged under EDP may be awarded an honorable or general discharge certificate as appropriate (see para 1-9).

(3) No member shall be awarded a general discharge under this paragraph unless given the opportunity to consult with an appointed counsel for consultation (see para 1-3c).

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(4) No member shall be given a general discharge by the discharge authority unless it was recommended by the commander initiating the recommendation for discharge. In cases in which the discharge authority disagrees with the recommendation for an honorable discharge, the case will be returned to the initiating commander with comment to that effect. The initiating commander may either initiate new proceedings under this paragraph or take other appropriate action.

(5) Discharge authorities may award an honorable discharge if general discharge is recommended by the initiating commander.

(6) When an individual being processed under this program absents himself without leave while in the continental United States, Alaska, Hawaii, or a US territory or possession, the Army member's discharge may be executed in absentia provided the absence occurre[illegible]quent to the date the individual consented to discharge and the date the initiating commander formally recommended approval of the case. Discharge in absentia for this program does not apply to individuals absent in civil confinement or for whom civil or military trial or charges are pending. Absentia discharges will be approved by the discharge authority before executed.

(7) Discharge should be accomplished within 3 duty days following approval by discharge authority.

g. Procedures.

(1) The affected member's immediate commander will personally notify the member in writing of the proposed discharge, the reasons therefor, and the effect of the discharge. (See figure 5-3 for notification letter.) This form letter is authorized for local reproduction. In paragraph 2 of letter covering reasons for proposed action, state specific facts and incidents which are the basis for this action. The date in para 7 should allow the member at least 48 hours to consult with counsel when a general discharge is recommended.

(2) Under the provisions of paragraph f(3) above, counsel will, upon request, be provided to an individual recommended for a general discharge. Necessary administrative support will be made available to assist the individual in preparing the indorsement.

(3) Acknowledgement by the affected member will be in the form of an indorsement returning the notification to his/her immediate commander. (See figure 5-4

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for indorsement. This form indorsement is authorized for local reproduction.)

(4) If the affected member voluntarily consents to the proposed discharge, the immediate commander will forward his letter and the acknowledgement by indorsement through command channels to the commander exercising discharge authority The immediate commander's indorsement should include pertinent information such as number of article 15's, number of courts-martials and the number of times counselled The discharge authority will insure that the member has been fully counseled, that the recommendation for discharge is fully supported, and that such action is not in conflict with any provisions of this program. Reassignment for rehabilitation will be considered, if warranted.

(5) If the affected member does not consent to the proposed discharge, the case will be closed and other separation or disciplinary action taken if warranted.

(6) The discharge authority may disapprove a recommendation for discharge under this paragraph and return the case to the initiating commander for other disposition.

(7) Disposition of documents generated in the course of processing such cases will be as follows:

(a) When discharge is approved, the notification letter, acknowledgement indorsement, and each forwarding indorsement, including the discharge authority's approval will be made a part of the individual's permanent record (MPRJ).

(b) When the member does not consent to such discharge, or the recommended discharge is not approved, the pertinent documents will be retained in the member's MPRJ until he/she is reassigned or ETS, at which time they will be destroyed.

h. Discharge Authority. Lieutenant colonels (05) who are commanders of battalions and battalion-size units are authorized to order discharge under this program. This authority may not be delegated.

i. Special Orders. The reason and authority for separation (item 9c, DD Form 214) will be entered in accordance with AR 635-5-1. Authority, para 5-37, AR 635-200, reason and RE Code 3 will be included in orders directing the member to report to an appropriate transfer activity for separation processing. Reason will be for

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"failure to meet acceptable standards for continued military service." Army National Guard members will be discharged from their "Reserve of the Army" status only, and will be returned to the control of the appropriate State National Guard authority for discharge. A copy of the approved proceedings will be forwarded to the Adjutant General of the state.

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Code of Federal Regulations

38

Pensions, Bonuses, and Veterans' Relief

Revised as of July 1, 1977

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1977

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

ORGANIC BRAIN DISORDERS—Continued

	Rating
Before attempting to rate brain syndromes, rating specialists should become thoroughly acquainted with the relevant concepts presented by the current Diagnostic and Statistical Manual of the American Psychiatric Association and the following: (1) Under the codes 9300 through 9326 the basic syndrome of organic brain disorder may be the only mental disturbance present or it may appear with related "psychotic" manifestations. An organic brain syndrome with or without such qualifying phrase will be rated according to the general rating formula for organic brain syndromes, assigning a rating which reflects the entire psychiatric picture. (2) An organic brain syndrome, as defined in the American Psychiatric Association manual, is characterized solely by psychiatric manifestations. However, neurological or other manifestations of etiology common to the brain syndrome may be present, and if present, are to be rated separately as distinct entities under the neurological or other appropriate system and combined with the rating for the brain syndrome.	
General Rating Formula for Organic Brain Syndromes:	
Impairment of intellectual functions, orientation, memory and judgment, and liability and shallowness of affect of such extent, severity, depth, and persistence as to produce complete social and industrial inadaptability	100
Less than 100 percent, in symptom combination productive of:	
Severe impairment of social and industrial adaptability	70
Considerable impairment of social and industrial adaptability	50
Definite impairment of social and industrial adaptability	30
Slight impairment of social and industrial adaptability	10
No impairment of social and industrial adaptability	0

PSYCHONEUROTIC DISORDERS

		Rating
9400	Anxiety neurosis	
9401	Hysterical neurosis, dissociative type	
9402	Hysterical neurosis, conversion type	
9403	Phobic neurosis	
9404	Obsessive compulsive neurosis	
9405	Depressive neurosis	
9406	[Revoked]	
9407	Neurasthenic neurosis (formerly psychophysiologic nervous system reaction)	
9408	Depersonalization neurosis	
9409	Hypochondriacal neurosis	
9410	Other and unspecified neurosis	

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PSYCHOPHYSIOLOGIC DISORDERS

9500	Psychophysiologic skin disorder	
9501	Psychophysiologic cardiovascular disorder	
9502	Psychophysiologic gastrointestinal disorder	
9503	[Revoked]	
9504	[Revoked]	
9505	Psychophysiologic musculoskeletal disorder	
9506	Psychophysiologic respiratory disorder	
9507	Psychophysiologic hemic and lymphatic disorder	
9508	Psychophysiologic genitourinary disorder	
9509	Psychophysiologic endocrine disorder	
9510	Psychophysiologic disorder of organ of special sense (specify sense organ)	
9511	Psychophysiologic disorder of other type	

[41 FR 11302, Mar. 18, 1976]

DENTAL AND ORAL CONDITIONS

§ 4.150 Schedule of ratings—dental and oral conditions.

		Rating
9900	Maxilla or mandible, osteomyelitis of, chronic. Rate as osteomyelitis, chronic.	
9901	Mandible, loss of, complete, between angles	100
9902	Mandible, loss of approximately one-half:	
	Involving temporomandibular articulation	50
	Not involving temporomandibular articulation	30
9903	Mandible, nonunion of:	
	Severe	30

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at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records.

(d) *Combat.* Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation. (38 U.S.C. 354(b))

(e) *Prisoners of war.* Where disability compensation is claimed by a former prisoner of war, omission of history or findings from clinical records made upon repatriation is not determinative of service connection, particularly if evidence of comrades in support of the incurrence of the disability during confinement is available. Special attention will be given to any disability first reported after discharge, especially if poorly defined and not obviously of intercurrent origin. The circumstances attendant upon the individual veteran's confinement and the duration thereof will be associated with pertinent medical principles in determining whether disability manifested subsequent to service is etiologically related to the prisoner of war experience.

[26 FR 1580, Feb. 24, 1961, as amended at 31 FR 4680, Mar. 19, 1966; 39 FR 34530, Sept. 26, 1974]

§ 3.305 Direct service connection; peacetime service before January 1, 1947.

(a) *General.* The basic considerations relating to service connection are stated in § 3.303. The criteria in this section apply only to disabilities which may have resulted from service other than in a period of war before January 1, 1947.

(b) *Presumption of soundness.* A peacetime veteran who has had active, continuous service of 6 months or more will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities or disorders noted at the time thereof, or where evidence or medical judgment, as distinguished from medical fact and principles, establishes that an injury or disease preexisted service. Any evidence acceptable as competent to indicate the time of existence or inception of the condition may be considered. Determinations based on medical judgment will take cognizance of the time of inception or manifestation of disease or injury following entrance into service, as shown by proper service authorities in service records, entries or reports. Such records will be accorded reasonable weight in consideration of other evidence and sound medical reasoning. Opinions may be solicited from Veterans Administration medical authorities when considered necessary.

(c) *Campaigns and expeditions.* In considering claims of veterans who engaged in combat during campaigns or expeditions satisfactory lay or other evidence of incurrence or aggravation in such combat of an injury or disease, if consistent with the circumstances, conditions or hardships of such service will be accepted as sufficient proof of service connection, even when there is no official record of incurrence or aggravation. Service connection for such injury or disease may be rebutted by clear and convincing evidence to the contrary.

[26 FR 1580, Feb. 24, 1961, as amended at 28 FR 3088, Mar. 29, 1963; 39 FR 34530, Sept. 26, 1974]

§ 3.306 Aggravation of preservice disability.

(a) *General.* A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. (38 U.S.C. 353)

(b) *War service.* Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress

of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

(1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability. (38 U.S.C. 354)

(c) *Peacetime service.* The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by reason of the inherent character of the condition, aside from any extraneous or contributing cause or influence peculiar to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

[26 FR 1580, Feb. 24, 1961]

§ 3.307 Presumptive service connection for chronic, tropical or prisoner of war related disease; wartime and service on or after January 1, 1947.

(a) *General.* A chronic, tropical or prisoner of war related disease listed in § 3.309 will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in § 3.309(a) will be considered chronic.

(1) *Service.* The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period, or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing the presumptive service connection of a specified disease under the conditions listed in § 3.309(c).

(2) *Separation from service.* For the purpose of paragraph (a) (3), (4) and (5) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) *Chronic disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) *Tropical disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected. (38 U.S.C. 312)

(5) *Diseases specific as to prisoners of war.* The disease must have become manifest to a degree of 10 percent or more at any time after service, except psychosis which must have become manifest to a degree of 10 percent within 2 years from the date of separation from service as specified in para-